Supreme Court, U.S.
FILED
APR 4 1997
CLERK

(3)

No. 96-1393

In The

Supreme Court of the United States

October Term, 1996

MISSOURI PACIFIC RAILROAD COMPANY/UNION PACIFIC RAILROAD COMPANY,

Petitioners,

vs.

CHARLES A. HARPER,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Fifth District

RESPONDENT'S BRIEF IN OPPOSITION

SCHLICHTER, BOGARD & DENTON

JEROME J. SCHLICHTER
Attorney of Record
333 Salem Place, #260
Fairview Heights, IL 62208
(618) 632-3329

Counsel for Respondent
Charles A. Harper

April, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

39 pp

TABLE OF CONTENTS

Page

Table of Contents i

Restatement of the Case 1

Reasons for Denying the Writ 10

I. The Decision of the Illinois Appellate Court Enjoining Petitioners' Practice of Requiring Notice and Consent Before an Injured Employee's Counsel Interviews an Accident Witness as Violating 45 U.S.C. § 60 was Appropriate in the Factual Context of the Instant Case 10

II. There is no need for this Court to "Resolve the Conflict" Among the Courts Because the "Conflict" is Based on Differing Factual Records and the Injunction Issued by the Illinois Court is Specifically Tailored to the Facts at Hand 12

III. The Decision of the Illinois Appellate Court that 45 U.S.C. § 60 Pre-Empts State Bar Rules in the Instant Case is Correct Under the Facts of this Case, the Clear Language of Section 60 and Congress' Intent in Enacting § 60 14

IV. Petitioners Cannot Refute Evidence that Respondent's Attorneys and Employees were Intimidated by Their Policies and that the Free Flow of Information was Petitioners' Target 19

V. The Illinois Circuit Court had Authority to Issue Injunctive Relief, Specifically Tailored to Affect those Parties Before it Under 45 U.S.C. § 60 Regardless of the Fact that Others may Benefit from the Injunction 21

TABLE OF CONTENTS – Continued

Page

VI. Petitioners Changed their Internal Work Rule 807 Eliminating the Words "Person in Interest" Four Months After the Circuit Court Held in its Preliminary Injunction that "Persons in Interest", Pursuant to Section 60, Included Attorneys Representing FELA Claimants and thus Petitioners Were Properly Found in Contempt of Court for Their Wilful Violation of the Preliminary Injunction..... 23

VII. The Letter Petitioners Were Ordered to Send to Their Employees Regarding their New Rule Regarding Statements is Appropriate Given Petitioners' Contempt and Sufficiently Protects Against Disclosure of Confidential and Privileged Information and Interviews During Work or on Railroad Property 24

Conclusion 25

TABLE OF AUTHORITIES

Page

CASES

Bailey v. Patterson, 323 F.2d 201 (5th Cir. 1963) ...21, 22

Blasena v. Consolidated Rail Corporation, 898 F.Supp. 282 (D.N.J. 1995) 11, 17, 18

Branham v. Norfolk & Western Railway Company, 151 F.R.D. 67 (S.D.W.Va. 1993) 11, 12

Garrett v. Moore-McCormack Co., 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942) 13

Garrett v. National Railroad Passenger Corp., 1990 WL 122911 (E.D.Pa. 1990) 12

Harper v. Missouri Pacific Railroad Company, 636 N.E.2d 1192 (Ill.App.5th Dist. 1994) 4, 12, 16

In re Hallett, 58 Ill.2d 239, 319 N.E.2d 48 (Ill. 1974) 18

Lake v. Orgulf Transportation Co., 1993 WL 194096 (W.D.Tenn. 1993) 11

Norfolk Southern Railway Company v. Thompson, 430 S.E.2d 371 (Ga.App. 1993) 11

Queensberry v. Norfolk & Western Railway Company, 157 F.R.D. 1993 (E.D.Va.1993) 11

State v. O'Malley, 888 S.W.2d 760 (Mo.App.W.D. 1994) 11, 12, 14

Tucker v. Norfolk & Western Railway Company, 849 F.Supp. 1096 (E.D.Va. 1994) 11, 12, 14

United Transportation Union Local Unions 385 and 77 v. Metro-North Commuter Railroad Company, 1995 WL 634906 (S.D.N.Y. 1995) 11, 17, 18

STATUTES

45 U.S.C. § 60 ..... *passim*

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Charles Harper, respectfully requests that this Court deny the petition for Writ of Certiorari which seeks review of the Appellate Court of Illinois, Fifth District. That opinion is reprinted in the Petition for Writ of Certiorari at Appendix A-2 through A-23.

RESTATEMENT OF THE CASE

Petitioners' statement of the case omits that they were twice cited for contempt by the Circuit Court of Madison County for violating the terms of an injunction and for deliberately altering the text of an internal work rule four months after the preliminary injunction was issued by removing words denoting a plaintiff's attorney as a party permitted to receive information via statements concerning employee injuries. Petitioners also fail to include the detailed and extensive factual record made by the Circuit Court of Madison County, finding that they had engaged in behavior which created an "atmosphere of intimidation" at the railroads as to employee witnesses of on the job injuries.

I. PROCEDURAL HISTORY

Petitioners seek a Writ of Certiorari, yet come before this Court with a history of disobeying orders of the Circuit and Appellate Courts in Illinois. The Circuit Court of Madison County specifically found that Petitioners had a history of intimidating their employees in order to ensure their silence in the presence of injured workers

and their representatives, in violation of the Federal Employers Liability Act, 45 U.S.C. § 60. Section 60 of the Act states:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine. . . . Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

Respondent Charles Harper filed suit under 45 U.S.C. § 51 *et seq.*, the Federal Employers Liability Act (hereinafter the "FELA") in November 1993, for carpal tunnel injuries caused by the negligence of Petitioners. Two months before Respondent had even filed his FELA action, Petitioners sent Harper's attorneys a letter demanding that they notify the railroads prior to communicating with any railroad employees, and to wait to interview employee witnesses until the railroads consented. Harper's attorneys responded to this letter and all others like it and then received a letter from Petitioners' counsel, in another case, stating that contacting employees regarding accidents violated ethical rules and

Petitioners would report contacts that they believed violated ethical rules. In response to the railroads' letters, and in order to engage in informal discovery, Respondent included in his complaint a request that the Circuit Court of Madison County issue a Temporary Restraining Order and an Injunction enjoining Petitioners practice of requiring their prior consent for contact with employee witnesses pursuant to 45 U.S.C. § 60.

The Circuit Court issued a TRO on November 23, 1993, and its preliminary injunction on December 9, 1993, prohibiting the railroads from "carrying out their practice, policy, and use of letters requiring knowledge and consent of employee witness interviews concerning facts incident to FELA claimants' injuries, or in any way interfering with their employees regarding such claims, . . . ". (Appendix 3). The Circuit Court of Madison County, after listening to testimony of railroad employees, found that the railroads had engaged in threatening behavior toward their employees who witnessed on-the-job injuries, which created an atmosphere of intimidation, and inhibited the free flow of information to attorneys representing injured workers. (Appendix 4). The Court also found that "persons in interest" as contemplated under § 60 of the FELA included claimants' attorneys, and therefore information regarding accidents could be given to them. Moreover, the Court found that Mr. Harper's attorneys had themselves been threatened by the railroads if they communicated *ex parte* with witnesses (Appendix 1, p. 4), and as a consequence of the railroads' actions, the Court found that Petitioners had violated § 60. (Appendix 4).

Undaunted, and completely ignoring the Court's Preliminary Injunction, Petitioners continued to send letters

to Respondent's attorneys, as well as to attorneys representing other injured workers. As a consequence, the Circuit Court entered an Order of Contempt against Petitioners on May 26, 1994, finding this behavior to be a "serious rejection of [its] authority." (Appendix 8).

In June, 1994, the Appellate Court of Illinois, Fifth District, upheld the preliminary injunction, enjoining the use of the railroads' letter to plaintiffs' attorneys. *Harper v. Missouri Pacific Railroad Company*, 636 N.E.2d 1192 (Ill.App.5th Dist. 1994) (hereinafter "Harper I") (reprinted in Petition for Writ of Certiorari, App.A-24 through A-43). The Court noted that it was unable to "conceive, nor is it seriously suggested by the defendants, that there is any purpose for sending the form letters to all FELA claimants' attorneys other than to restrict claimants' attorneys from obtaining information from railroad employees about the facts incident to the injury or death of an employee." Harper I at 1201. In fact, the railroads had never disputed that discouraging communication between their employees and attorneys for FELA claimants was their goal, nor argued that the letters did not violate § 60. *Id.* at 1202. As the Court noted, "section 60, by its very breadth, prohibits any act by the defendants to effectuate a cover-up or to make discovery of the causes of the accident more difficult." *Id.*

Two months after the Appellate Court's decision, Respondent became aware that Petitioners had revised, effective April 10, 1994, an internal work rule regulating the persons to whom their employees could speak concerning accidents. Whereas Petitioners' previous rule, Rule 807(2), authorized communication with "**a person in interest**, such as the injured employee, or an immediate

relative of the injured or deceased employee, or to an officer of the law", the revised rule, Rule 1.2.6, permitted communication only to "the injured or deceased employee, an immediate relative of the injured or deceased employee, **an authorized representative of the railroad**, or an officer of the law." In light of the Circuit Court's explicit statement in the Preliminary Injunction Order that attorneys representing FELA claimants are "persons in interest" under § 60 of the FELA, the removal of the words "person in interest" from the revised rule was "a willful and flagrant violation of [the] Court's Preliminary Injunction Order, . . . " (Reproduced in the Petition for Writ of Certiorari at Appendix A-52). The Circuit Court heard the testimony of Petitioners' employee, Robert Pugmire, a member of the committee which revised the rule, that the revision had been in the works for two years prior to the preliminary injunction order. However, the Court obviously found his testimony to be lacking credibility, and his explanations ludicrous[1]. Not only was the language of the rule changed within

---

[1] The Appellate Court, with the Circuit Court, found Mr. Pugmire's testimony farcical, saying "the trial court obviously believed that the removal of the words 'persons in interest' approximately four months after the December 9, 1993, order was not a mere coincidence and chose to disregard Robert Pugmire's testimony that the change was made in order to make the rule simpler and easier to understand and that the 'rules committee' did not consider [the new rule] a change from the prior rule. . . . Here, we agree with the trial court's determination that the revision was done in willful violation of the preliminary injunction." (Reproduced at Petition for Writ of Certiorari, App.A-19).

four months of the Court's Order, but it is hard to understand how merely removing the words "person in interest" would make the rule easier to understand, as Pugmire asserted.

Thereafter, the Circuit Court found Petitioners in contempt of court for deliberately violating its orders and issued its second Contempt Order, and made the injunction permanent on June 30, 1995. (Both documents are reprinted in the Petition for Writ of Certiorari at Appendix A-44 through A-53). The injunction found that Petitioners' practice violated § 60 and was void; that Respondent's attorneys, Schlichter, Bogard & Denton, be permitted to continue interviewing, *ex parte*, employee witnesses while off duty and off railroad roperty; that any state statute which violated § 60 was void; and enjoined Petitioners from requiring their knowledge and consent with regard to interviews of employees by Schlichter, Bogard & Denton. The contempt order required Petitioners to rescind or revise the rule, to send a copy of a letter informing their employees to disregard Rule 1.2.6 regarding statements, to include with the letter to their employees a copy of the Court Order, to report to the Court concerning their compliance with the Order, and to pay certain sums of money. (App.A-52, A-53).

On August 6, 1996, the Appellate Court upheld the permanent injunction as well as the two contempt orders, stating "Defendants would obviously like this case to drag on interminably, . . . ". (App.A-12). The Appellate Court found Petitioners to be "disingenuous" by calling into question the Court's earlier opinion in Harper I. (App.A-13). Despite Petitioners' consistent claim that the trial court's specific finding that they have created an

intimidating atmosphere is unsupported by the evidence, the Appellate Court found to the contrary, stating "the witnesses who testified for defendants simply did not provide strong enough testimony to overcome the evidence produced by plaintiff that among railroad employees an atmosphere of intimidation prevailed." (App.A-13-14). The Appellate Court further said that the "plaintiff had, in fact, already established, by a preponderance of the evidence, that the general atmosphere of the railroad intimidates railroad employees from furnishing evidence in cases brought under the Act (citation omitted), and that by virtue of defendants' intimidating actions, it would be difficult for plaintiff to find employees ready to testify on plaintiff's behalf, thus establishing the need for an injunction." (App.A-14). Moreover, the testimony which Petitioners claim demonstrates that all intimidation ended at least eight years ago, and was committed by employees who are now dead or retired, is not persuasive. For instance, Wallace Deal testified that even today there is an atmosphere of fear which exists for reporting injuries, especially among laborers (App.A-15), and the Appellate Court found that, despite the witnesses assertions that their present supervisor had not threatened them to keep silent about accidents himself, the preponderance of the evidence and overall tone of the testimony persuaded it that there is a hostile environment at the railroads which intimidates employees

from voluntarily furnishing evidence to FELA claimants and their attorneys[2]. (App.A-15).

The Appellate Court minced no words when it declared "Defendants need to understand that we find these actions [violating section 60 of the FELA] reprehensible and an affront to the orderly administration of justice in cases brought under the Act. We strongly believe any court in the country would be incensed by defendants' flagrant violations of the Act." (App.A-16).

II. FACTS FOUND BY THE LOWER COURT

The Circuit Court issued its injunctions after extensive hearings and the presentation of evidence by the parties. Specifically, the trial court found that employee witnesses were reluctant to communicate with representatives of injured FELA claimants, finding:

> Defendants have created an atmosphere of intimidation of employees who have knowledge regarding on-the-job injuries, and that such atmosphere has caused some employees to

---

[2] The Appellate Court based its finding of a hostile environment at the railroad on the following:

1) Defense witness Williams refused to talk to plaintiff's attorneys prior to the hearing although he did talk with the defense attorneys; 2) Defendants' witness Robert Tritch testified that he believes there is an atmosphere of intimidation at the railroad, and that he knows personally some railroad employees who have been intimidated or discouraged from talking to attorneys for an injured worker; and 3) the railroad issued a new rule on April 10, 1994 which several employees testified would lead them to believe that they should not talk to an injured worker's attorney. (App.A-15).

> refuse to talk to injured employees' representatives, and to limit their voluntary furnishing of information to employees' representatives. There exists on the part of employees of the Union Pacific/Missouri Pacific Railroad a fear of discipline or discharge if an employee voluntarily furnishes facts incident to an FELA claimant's injuries to the claimant's representatives. Representatives of the railroad, including attorneys representing the railroad, can and have intimidated employee witnesses from voluntarily providing information to claimant's representatives." (App.A-46).

The Illinois Appellate Court, Fifth District, affirmed the lower court's factual findings of an atmosphere of intimidation at the railroads. (App.A-40). The trial court further found from Respondent's testimony that Mr. Harper felt intimidated when a claims agent once came to his home to discuss an accident he witnessed, and that, as a result of filing an accident report in that incident, he was given "dirty duties". (App.A-5). The Circuit Court made a thorough factual record that an intimidating atmosphere existed such that injured workers with potential FELA claims were denied information available to Petitioners, and that witnesses possessed a "fear of discipline or discharge if an employee voluntarily furnishes facts incident to an FELA claimant's injuries to the claimant's representatives." The Court further found that Petitioners seek to prevent the free flow of information to these claimants, and that Petitioners had "threatened employees who are witnesses to on-the-job injuries", that Petitioners' letters to Respondent's counsel was a "veiled threat to Plaintiff's counsel, is ongoing and has a chilling effect on the interviewing of witnesses . . . " Finally, the

Circuit Court found that Respondent, and other employees with on-the-job injuries, would be irreparably harmed by the impairment of their right to the free flow of information regarding their FELA claims, that they would have no remedy, and that this violated the clear language and intent of § 60. (App.A-47).

REASONS FOR DENYING THE WRIT

I. The Decision of the Illinois Appellate Court Enjoining Petitioners' Practice of Requiring Notice and Consent Before an Injured Employee's Counsel Interviews an Accident Witness as Violating 45 U.S.C. § 60 was Appropriate in the Factual Context of the Instant Case.

A decision from this Court is unnecessary because the only "conflict" found between the instant and other courts concerning the effect of § 60 is largely a creation of Petitioners' imagination. None of the cases cited by Petitioners regarding § 60 have the factual record herein. There is no evidence that the cases cited by Petitioners would reach different conclusions than the instant case in the face of facts demonstrating an atmosphere of intimidation, as found by the Illinois judiciary to exist at the Missouri Pacific and Union Pacific railroads.

Most states, including Illinois, have adopted a variation of the American Bar Association's (ABA) Model Rule of Professional Conduct 4.2, which provides:

> During the course of representing a client a lawyer shall not communicate or cause to communicate on the subject of the representation

> with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party **or as may be authorized by law.**

(emphasis added). The Official Comment to this rule clarifies those persons with whom *ex parte* communication is prohibited when one of the parties is a corporation. These persons are 1) those with managerial responsibility for the organization; 2) those whose act or omission in connection with the matter may be imputed to the organization for purposes of liability; and 3) those whose statements may constitute an admission by the organization.

The Illinois Appellate Court ruled that a railroad may not rely on the Illinois Code of Professional Conduct to side step the mandate of § 60. Similar rulings have been made by courts in New York, Georgia, New Jersey and Tennessee. *See United Transportation Union Local Unions 385 and 77 v. Metro-North Commuter Railroad Company*, 1995 WL 634906 (S.D.N.Y. 1995); *Blasena v. Consolidated Rail Corporation*, 898 F.Supp. 282 (D.N.J. 1995); *Norfolk Southern Railway Company v. Thompson*, 430 S.E.2d 371 (Ga.App. 1993); and *Lake v. Orgulf Transportation Co.*, 1993 WL 194096 (W.D.Tenn. 1993).

The cases cited by the Missouri Pacific and Union Pacific railroads do not have the factual backdrop present in the instant case and thus are inapplicable. *See* e.g. *Branham v. Norfolk & Western Railway Company*, 151 F.R.D. 67, (S.D.W.Va. 1993), *State v. O'Malley*, 888 S.W.2d 760 (Mo.App.W.D. 1994), *Tucker v. Norfolk & Western Railway Company*, 849 F.Supp. 1096 (E.D.Va. 1994), *Queensberry v.*

Norfolk & Western Railway Company, 157 F.R.D. 1993 (E.D.Va.1993) (no finding in that case that railroads' actions rose to level of coercion or intimidation), and *Garrett v. National Railroad Passenger Corp.*, 1990 WL 122911 (E.D.Pa. 1990) (no finding that railroad had engaged in a policy or practice of intimidation). As the court in *Tucker* stated "this is not to say, however, that a plaintiff would never make a showing sufficient to support a finding that the presence of a railroad's lawyer in fact would create a 'direct or indirect chill on the availability of information,' (citations omitted). *In that event, 45 U.S.C. § 60 would require a different result.*" 849 F.Supp. at 1101 (emphasis added). The Missouri Appellate Court aptly stated "for an example of railroad conduct that Congress sought to prevent, see *Harper v. Missouri Pacific R.R.*, . . . ". *O'Malley*, 888 S.W.2d at 762. The *Branham* court prefaced its decision with the observation that "at the hearing on the motion, scant attention was given the facts underlying plaintiff's claim or the circumstances involved in prior *ex parte* contacts." 151 F.R.D. at 68. Therefore, despite Petitioners' claims, the decisions rest on the varying factual records presented to the courts, not necessarily a universal conflict.

II. There is no need for this Court to "Resolve the Conflict" Among the Courts Because the "Conflict" is Based on Differing Factual Records and the Injunction Issued by the Illinois Court is Specifically Tailored to the Facts at Hand.

As previously discussed, the cases cited by Petitioners did not involve a record showing that the railroad engaged in a practice of intimidation and threats to the

free flow of information. The injunctions issued in this case were not the result merely of a ruling that § 60 preempts Illinois ethical rules which conflict with it, but included detailed findings of fact that Petitioners had created an atmosphere of intimidation, including the offending letters, in direct violation of § 60 of the FELA.

Additionally, the injunctions in the present case specifically refer to the activities in which Petitioners were engaged, and prohibit Petitioners from interfering in communications protected by § 60. The Circuit Court issued the injunctions in response to Respondent's prayer in his complaint for the Court to find that "Section 60 of the FELA (45 U.S.C.) authorized Plaintiff's representatives to communicate with railroad employees and does not require notice to or consent of, the railroad . . . ". This request is one for system-wide relief for all Petitioners' employees affected by Petitioners' illegal practice. Therefore, the injunctive orders are no broader in scope than the relief sought in the pleadings, and are binding upon Petitioners.

The relief prohibiting Petitioners' policies complies with Supreme Court decisions that the FELA is to have a uniform application throughout the country, unaffected by local views of common law rules. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244, 63 S.Ct. 246, 87 L.Ed. 239 (1942). This rule of uniformity for all persons falling under the FELA would require that Petitioners cease their policy, not only with respect to Respondent, but as it affects all their employees covered by the FELA.

Finally, Petitioners' incorrectly claim that the present injunction will work to enjoin other states' Rules of Professional Conduct. This is not the case. The injunction found that Petitioners violated § 60, and the factual records supports it. The injunction prohibits Petitioners from violating § 60 by sending out improper letters and intimidating employees. In fact, several of the jurisdictions which find that state ethical rules are not pre-empted explicitly stated that their decisions would be different if they had been faced with a situation similar to that herein. *See O'Malley*, 888 S.W.2d at 762, and *Tucker*, 849 F. Supp. 1101. Whether other states interpret Rule 4.2 differently is no matter in the present case where a railroad is found to violate § 60 by its own practices.

III. The Decision of the Illinois Appellate Court that 45 U.S.C. § 60 Pre-Empts State Bar Rules in the Instant Case is Correct Under the Facts of this Case, the Clear Language of Section 60 and Congress' Intent in Enacting § 60.

Given the specific factual context of the instant case, this Court need not decide whether § 60 in fact pre-empts state bar rules. However, if this Court wishes to address the issue, simply put, § 60 does. Both the language and the intent behind § 60 make it resoundingly clear that it is meant to protect railroad workers from dangers and inequities, from whatever source, which have the effect of interfering with open communication regarding accidents. Section 60 explicitly states "**Any** contract, rule, regulation, or **device whatsoever**, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing information voluntarily

to a person in interest as to facts incident to the injury or death of any employee, **shall be void**, . . . ". Using the most basic of the canons of statutory construction, the words mean what they say, and Congress is presumed to write what it means. If Congress meant only railroad rules or regulations, then Congress would have made that clear.

Moreover, the **intent** of congress, as found in S.Rep. No. 661, 76th Cong., 1st sess. 5 (1939), supports interpreting the statute as it is written:

> The railroads maintain well-organized and highly efficient claim departments. When an employee is injured, the claim agent promptly endeavors to procure statements from all witnesses to the infliction of the injury, takes photographs, measurements, and obtains all available information considered necessary to protect the railway company against a possible suit for damages.
>
> On the other hand, the claimant may be seriously handicapped in his attempt to procure information necessary to the determination of the question of liability. For example, a substantial number of the railroads subject to the Employers' Liability Act have promulgated rules which prohibit employees from giving information concerning an accident to anyone excepting certain specified company officials and claim agents.
>
> The purpose of the amendment under consideration is to prohibit the enforcement of such rules and permit those who have information concerning the facts and circumstances of a personal injury to give the statements to the injured

> employee or his dependents, or to someone authorized to represent him or them.
>
> In relation to the investigation of facts upon which claims or injuries are based, humanity and justice demand that injured railroad men be accorded as much freedom of action as their employers enjoy.
>
> The amendment fully protects the employer against abuses which might result from so-called ambulance chasing by limiting those to whom information may be given without restriction to the actual parties in interest or those who have been duly authorized to represent them.

This history demonstrates that Congress sought to level the playing field between the railroads and the injured railroad worker. Congress knew that the railroads might not play fair, and that the injured worker with an FELA claim against the railroad might not get fairness and equality if he were not permitted to talk to witnesses without the presence of the railroads' attorneys or claims personnel. As the Illinois Appellate Court noted in Harper I, "it is elementary that an attorney cannot schedule depositions or frame intelligent interrogatories without having some basic information about the facts of the case, which the attorney often cannot obtain satisfactorily from the claimant alone." 636 N.E.2d 1192. The intent of Congress makes clear that an injured railroad worker is just as harmed by *any device* which prevents him from obtaining information necessary to his claim whether the device is promulgated by the railroad or not. The effect is the same on the claimant's ability to prepare his case, and such an *effect* violates § 60.

In *United Transportation Union*, the New York District Court found that the protection of § 60 "implies the broadest kind of protection of such activity [as giving *ex parte* statements to others]." 1995 WL 634906, *4. In order to extend these protections, Congress must have intended to provide railroaders with the same freedom as their employers, which "must have included the ability to engage in informal interviewing and other expeditious means of assembling information without need for the permission or presence of opposing counsel, since the railroads themselves were free to engage in such acts." *Id.* "FELA § 60, as a matter of policy, seeks to place the fact-gathering capabilities of plaintiffs on a par with those of their employers . . . " *Id.* *6.

Another court eloquently stated that any rule which would prevent communication has the effect of constituting a "rule, regulation or device the purpose of which shall be to prevent employees from furnishing information . . . ", which directly violates § 60. *Blasena v. Consolidated Rail Corporation*, 898 F.Supp. 282. The *Blasena* court noted that railroads can interview the employee/witnesses at will, but that requiring the injured worker whom Congress sought to protect to obtain consent puts that worker in an unequal position and contravenes the intent of § 60:

> Requiring Plaintiff to either obtain Defendant consent to employee interviews, or to conduct formal depositions, clearly has the effect of discouraging co-employees from providing information relating to FELA claims. At a minimum such a requirement has a potentially inhibiting effect on the willingness of employees to step forward and share candid information with

> an injured plaintiff. Rules which have such an inhibiting effect are, plainly and simply, barred by the clear language of Section 60.
>
> Any rule which requires the railroad to consent to the interview of an employee, or which requires the presence of a railroad representative, flies squarely in the face of the **unequivocal language of § 60**, and cannot be sustained.

Id. at 286.

Finally, the state ethical rules at issue are **not** statutes, and the Code of Professional Responsibility does not have the force of law. *In re Hallett*, 58 Ill.2d 239, 319 N.E.2d 48 (Ill. 1974). They are standards of conduct and so, "as primarily a matter of courtesy, the policies behind [the rules] do not have the same weight as those behind the substantive protections of § 60. While there is no question the Code of Professional Responsibility is critical to the profession, if there is a conflict with a federal law, the federal law must take precedence." *United Transportation Union*, 1995 WL 634906, *5-6. Therefore, Petitioners' contention that a determination that a federal law pre-empts a state statute or regulation should only be made if the conflict between the two is "irreconcilable" is wholly inappropriate. The rule is an internal organizational standard of conduct for its members, not a state law. It is, however, a "device" when used by the Petitioners to inhibit the free flow of information.

IV. Petitioners Cannot Refute Evidence that Respondent's Attorneys and Employees were Intimidated by Their Policies and that the Free Flow of Information was Petitioners' Target.

The danger of intimidation which the Circuit Court found was not that the employee witnesses would feel threatened in reporting accidents which they witnessed to the employers, but that they would not share their knowledge with those representing injured employees. Petitioners' references to the record showing that employees were no longer threatened with reprisals for reporting accidents **to the railroads**, on railroad accident forms maintained within the railroad's files, has absolutely no bearing on the fact, as found by the trial court, that Petitioners were inhibiting the free flow of information between counsel and accident witnesses. Congress created § 60 in an attempt to quell the intimidation of witnesses and balance the playing field by giving FELA claimants access to the same information which the railroads were able to obtain, *ex parte*, from their employees. The instant case represents precisely the situation Congress was trying to rectify. Petitioners have not pointed to any part of the record which would discredit the trial court's finding that an atmosphere of intimidation exists which stifles the free flow of information to claimants' attorneys. Petitioners merely state that it is their current policy that employees must report accidents to them. So what.

The Circuit Court heard evidence that there is an atmosphere of fear which currently exists regarding injuries, especially among laborers and that there is a hostile environment at the railroads which intimidates

employees from voluntarily furnishing evidence to FELA claimants and their attorneys. (App.A-15). With the addition of Petitioners' revised work rule eliminating the term "person in interest" as a person to whom an employee may give information, an employee with information concerning an accident is even more unlikely to talk freely with an FELA claimant's attorney. The testimony and evidence presented at the hearings for the injunctions satisfied the Circuit Court that § 60 was violated, which findings were affirmed by the Appellate Court.

The Appellate Court continued by recognizing the difficulty in presenting evidence that railroad employees were intimidated by the railroad from providing information about an accident. In that Court's words:

> By the defendants' logic, plaintiff would be required to find the witnesses that were already inhibited from testifying in his case in order to show a likelihood of success on the merits. If plaintiff had the ability to find and talk to these witnesses, as the defendants argue he should have, then, indeed, he would not have had to resort to the court for an injunction."

(App.A-42). The trial court and Appellate Court found that Mr. Harper provided sufficient evidence to justify the injunctions. This Court need not review their findings.

V. The Illinois Circuit Court had Authority to Issue Injunctive Relief, Specifically Tailored to Affect those Parties Before it Under 45 U.S.C. § 60 Regardless of the Fact that Others may Benefit from the Injunction.

If an action is necessary in order to comply with an injunction, the fact that others who were not parties to the proceeding may benefit does not make the injunction invalid. *Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963).

The case of *Bailey v. Patterson* is similar to the present matter. In *Bailey*, African American plaintiffs sought to enjoin enforcement of state and municipal segregation laws affecting common carriers. They also sought to enjoin the maintenance of racial segregation. The District Court found that it could not provide this relief because it was class relief and no class had been certified. The Fifth Circuit reversed, finding that the named plaintiffs were entitled to the relief sought, regardless of the fact that the relief would extend to all African Americans. The Court based its decision on the nature of the relief sought – in *Bailey*, the right to use facilities which were *desegregated*, and open to all persons – and stated "the very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated." *Id.* at 206. Because enjoining segregation only as it applied to the specific plaintiffs would not have provided the remedy of a desegregated environment, but only a white environment with a few non-white persons within, every single act of segregation was by necessity enjoined.

In the present matter before this Court, the relief sought by Mr. Harper similarly extends to those who were not parties. Respondent desired to conduct *ex parte* interviews of employee witnesses and Petitioners sent letters to his attorneys and enacted an internal rule, both of which had the effect of impeding the flow of information to the representatives of an injured worker covered by the FELA. In order to provide him with this relief, the court found that Petitioners were engaging in behavior which violated a federal statute, and found the behavior void. This was not a class-wide remedy, but one which, as in *Bailey*, fortuitously operates for the benefit of all affected persons.

The Circuit Court did not fashion class-wide relief as asserted by Petitioners. The injunctions named counsel and their agents as those permitted to conduct *ex parte* interviews of Petitioners' employees, and found Petitioners' practice of requiring their knowledge and consent before counsel could commence these interviews to be void pursuant to section 60. The remaining two sections found that any statute with the effect of prohibiting counsel from conducting *ex parte* interviews with Petitioners' employees regarding facts incident to FELA claimants' injuries to be pre-empted by section 60, and enjoined Petitioners from engaging in activity which had been pre-empted by federal statute.

VI. Petitioners Changed their Internal Work Rule 807 Eliminating the Words "Person in Interest" Four Months After the Circuit Court Held in its Preliminary Injunction that "Persons in Interest", Pursuant to Section 60, Included Attorneys Representing FELA Claimants and thus Petitioners Were Properly Found in Contempt of Court for Their Wilful Violation of the Preliminary Injunction.

In the Circuit Court's Preliminary Injunction it made note of the fact that attorneys for injured railroad workers are "persons in interest" pursuant to § 60. When the Court learned that four months after entering its Order, Petitioners altered their work rule **by removing the words "person in interest"**, and that this was the only change to the rule, the Court found Petitioners in contempt. Both the Circuit and Appellate Courts found Petitioners' claim that the change was made without consideration of either section 60 or the preliminary injunction wholly unbelievable and absurd. The Appellate Court found that "it is inconceivable that the revision was done for any other purpose than to attempt to prevent defendants' employees from providing information to injured parties' attorneys." (App.A-18). Such a purpose explicitly violates § 60.

No other explanation for the change is reasonable. Deleting three words which preface examples of persons to whom employees may speak cannot seriously be considered to make the rule less confusing. The effect of the change is to make the listed entities conclusive, excluding any others with whom Petitioners' employees can provide information regarding accidents.

The Court found Petitioners in contempt for willfully changing the rule in this way. It was irrelevant whether or not the witnesses were aware of the changes because the court sanctioned the behavior of the railroads. In addition, a witness testified that such a change would make him reluctant to speak with an attorney for an injured worker.

VII. The Letter Petitioners Were Ordered to Send to Their Employees Regarding their new Rule Regarding Statements is Appropriate Given Petitioners' Contempt and Sufficiently Protects Against Disclosure of Confidential and Privileged Information and Interviews During Work or on Railroad Property.

The Appellate Court addressed Petitioners' fear that the letters they have been ordered to send will result in the "purging" of their files of confidential information as employees seek to give information to injured workers and their counsel. The Court disagreed, recognizing that the letters "clearly state that rule 1.2.6 regarding *statements* should be disregarded, thus limiting the inapplicability of the rule to that section only. Additionally, we note that confidentiality in employee files is implicit, and ordering further language to be added to the letter to state such a fact is in our estimation unneccessary." (App.A-22 through A-23) (emphasis in the original).

The Appellate Court also specifically limited the injunction so that interviews should not take place on Petitioners' property or during the working hours of the employee witnesses to be interviewed. Harper I at 1204. Therefore, counsel are not permitted to seek interviews

with witnesses either on railroad grounds or during working hours. Such activity was already prohibited by the injunction and subsequent Appellate Court decision, and accordingly, Petitioners' complaint that the matter of the location and timing of interview is therefore baseless.

CONCLUSION

For the reasons stated herein, the Court should deny the Writ of Certiorari.

Respectfully Submitted,

SCHLICHTER, BOGARD & DENTON

JEROME J. SCHLICHTER
Attorney of Record
333 Salem Place, #260
Fairview Heights, IL 62208
(618) 632-3329

Counsel for Respondent
Charles A. Harper

April 1997

APPENDIX

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

CHARLES A. HARPER, Plaintiff,	)	
v.	)	CAUSE NO. 93-L-1209
MISSOURI PACIFIC RAILROAD COMPANY and UNION PACIFIC RAILROAD COMPANY, Defendants.	)	

PRELIMINARY INJUNCTION ORDER

(Filed Dec. 9, 1993)

This Court, having heard evidence and arguments of counsel, finds as follows:

1. That this Court has jurisdiction over the subject matter and the parties herein.

2. That Plaintiff has filed an action requesting that this Court declare that Plaintiff's attorneys, Schlichter, Bogard & Denton and their agents, have the right to interview employee witnesses of the Defendants ex parte who have knowledge of facts incident to an injury of a person brought pursuant to 45 U.S.C. 51 *et seq.* (FELA). Plaintiff alleges that Defendants' practice of requiring its knowledge and consent to employee witness interviews is void pursuant to 45 U.S.C. ¶60.

3. 45 U.S.C. ¶60 provides in part that "any . . . device whatsoever, the purpose, intent or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily [sic] information to a person in interest as to facts incident to the injury or death of any employee, shall be void. . . . " The purpose of 45 U.S.C. ¶60 is to equalize the access to information available to the claims departments of railroads and to individual FELA claimants and their representatives. *Stark v. Burlington Northern Railroad Company,* 538 F.Supp. 1061, 1062 (D.C. Col. 1982). Any action or device of the railroad which effectively restricts employee information as to the facts incident to any employees' injury is prohibited. *Stack v. Chicago, Minneapolis-St. Paul and Pacific Railroad Company,* 615 P.2d 457, 461 (Wash. 1980). Attorneys who represent employees asserting FELA claims or "persons in interest" pursuant to 45 U.S.C. ¶60. *Sheet Metal Workers International Association v. Burlington Northern Railway Company,* 736 F.2d 1250, 1251-52 (8th Cir. 1984).

4. This Court finds that Union Pacific Railroad/ Missouri Pacific Railroad has instituted a new policy requiring its notice and consent to interviews of its employee witnesses by Plaintiff's attorneys and other attorneys about facts incident to an [sic] FELA claim. This policy of the Union Pacific/Missouri Pacific is being applied to Charles Harper, Plaintiff herein, and to other FELA claimants who are injured while working for Union Pacific/Missouri Pacific. Attorneys representing the railroad have corresponded with counsel for Plaintiff indicating that railroads' counsel has an ethical obligation to report any ex parte interviews of employee witnesses to the Disciplinary Commission.

5. This Court finds that an actual controversy exists between this Plaintiff and his representatives, and other Plaintiffs' counsel representing injured employees in FELA matters against the Union Pacific/Missouri Pacific Railroad, and the Union Pacific/Missouri Pacific Railroad. Plaintiff has standing to bring this action because he has incurred, and continues to incur, direct harm as a result of Defendants' policy and practice, and he has a substantive interest in the protection afforded by 45 U.S.C. ¶60.

6. This Court finds, based on the evidence, that Defendants Union Pacific Railroad Company and Missouri Pacific Railroad Company have threatened employees who are witnesses to on-the-job injuries, that the effect of such threats is to coerce and intimidate employee witnesses, hindering their willingness to come forward with information about such injuries.

7. This Court further finds that the Defendants have created an atmosphere of intimidation of employees who have knowledge regarding on-the-job injuries, and that such atmosphere has caused some employees to refuse to talk to injured employees' representatives, and to limit their voluntary furnishing of information to employees' representatives. There exists on the part of employees of the Union Pacific/Missouri Pacific Railroad a fear of discipline or discharge if an employee voluntarily furnishes facts incident to an [sic] FELA claimant's injuries to the claimant's representatives. Representatives of the railroad, including attorneys representing the railroad, can and have intimidated employee witnesses from voluntarily providing information to claimant's representatives.

8. This Court finds that the purpose and effect of the policy of requiring Defendants' knowledge or consent before employees may be interviewed by injured parties' representatives is to prevent the free flow of information to injured employees and their representatives in violation of 45 U.S.C. ¶60 and that no adequate remedy at law exists to remedy this situation.

9. Defendants' attorneys, by sending letters suggesting that Plaintiff's counsel is acting unethically by conducting ex parte interview of Defendants' employees, are intimidating the representatives of FELA claimants, and this practice has the effect of preventing employee witness to on-the-job injuries from voluntarily furnishing information to claimants' attorneys, in violation of 45 U.S.C. ¶60. This Court finds that this is a veiled threat to Plaintiff's counsel, is ongoing and has a chilling effect on the interviewing of witnesses and, therefore, inhibiting the flow of voluntary information from witnesses.

10. Unless Defendants' policy and practice of requiring its knowledge and consent in order for FELA claimant's representative to interview Defendants' employees regarding facts incident to an injury, this Plaintiff, as well as other injured claimants, and Defendants' employees who have knowledge regarding on-the-job injury claims, will be irreparably harmed because their right to have the free flow of information regarding facts incident to FELA claims will be impaired, and cannot be remedied. It is not likely that once a witness has been intimidated, this can be reversed. Plaintiff has no adequate remedy at law.

11. This Court finds that it has long been the practice of FELA claimants' attorneys and their representatives to interview Defendants' employees without the knowledge and consent of the Defendants' and Defendants' new policy, practice, and letters of its attorneys, has and will continue to have, the effect of disrupting this long standing practice of ex parte interviews if this Court does not enjoin the policy and practice.

12. Based on the record before this Court, Plaintiff has shown a likelihood of success on the merits of his claim. A preliminary injunction is necessary to maintain the status quo between the parties and their representatives and continue to allow the free flow of information between FELA claimants' attorneys and Defendants' employee witnesses protected by 45 U.S.C. ¶60. Injunctive relief is available under 45 U.S.C. ¶60. *Hendley v. Central of Georgia Railroad*, 49 F.2d 1146, 1152 (5th Cir. 1980). In absence of this Court granting a preliminary injunction, Plaintiff and his representatives will suffer greater harm without the injunction than Defendants will suffer if it is issued. That is, Plaintiffs and their counsel, will be inhibited from conducting interviews of witnesses without the injunction, and with the injunction, the investigation of claims will remain in the same manner that existed before this controversy arose. Defendants will not be harmed by the requested injunctive relief.

IT IS, THEREFORE, THE ORDER OF THIS COURT THAT:

1. Defendants' practice, policy, and use of letters, instructing Plaintiff's counsel not to conduct interviews of its employees without its knowledge or consent who

have knowledge of facts incident to an [sic] FELA claimant's injury, is void pursuant to 45 U.S.C. ¶60.

2. Schlichter, Bogard & Denton and their agents may conduct ex parte interviews of Defendants' employees regarding facts incident to FELA claimants' injuries.

3. Any state statute or rule that would prohibit Plaintiff's counsel from conducting ex parte interviews with Defendants' employees regarding facts incident to FELA claimants' injuries, is preempted by federal law. 45 U.S.C. ¶60.

4. Defendants and their representatives are hereby enjoined and restrained from carrying out their practice, policy, and use of letters requiring knowledge and consent of employee witness interviews concerning facts incident to FELA claimants' injuries, or in any way interfering with ex parte communication by Plaintiff's attorneys with their employees regarding such claims, until further order of this Court.

SO ORDERED:

/s/ Daniel J. Stack

DATED: DEC 9 1993
DEC 09 1993

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

CHARLES A. HARPER, Plaintiff,	)	
-vs-	)	Case No. 93-L-1209
MISSOURI PACIFIC RAILROAD COMPANY AND UNION PACIFIC RAILROAD COMPANY, Defendants.	)	

ORDER

(Filed May 26, 1994)

On Plaintiff's Petition for a Contempt of Court Order and this Court having previously issued its Order directing Defendants Union Pacific Railroad Company and Missouri Pacific Railroad Company to show cause why they should not be held in contempt of court and the Court having heard evidence on this matter, this Court makes the following findings:

1. On December 9, 1993, this Court entered its preliminary Injunction Order finding to be a violation of 45 U.S.C. Section 60 Defendants' policy of requiring consent to attorney interviews with their employees regarding employee injuries.

2. Defendant railraods [sic] were present in court, served with, and fully aware of said Court Order.

3. After the date of this Order, Defendants have repeatedly violated the Order and have sent letters to

Schlichter, Bogard & Denton, the law firm which brought this case. Defendant railroads have also continued to send letters to other attorneys throughout the railroads' system, in violation of the Order.

4. Defendants have deliberately chosen to continue their policy enjoined in the December 9, 1993 Order, and this violation is continuing to the present; and in doing so, Defendants Union Pacific Railroad Company and Missouri Pacific Railroad Company are in contempt of this Court.

5. This Court finds the contempt by defendants to be a serious rejection of this Court's authority, and finds that it is a continuation of their intimidation of persons with knowledge regarding injury claims of defendants' employees.

6. This Court notes that Defendants have previously argued that the order is broad ranging and applies to its entire system and to all attorneys representing injured employees while arguing in the contempt hearing that the Order is limited. The Court finds that while the violation of the Court's Order by Defendants is intentional, it is not wilful at this time, based upon some typographical/ grammerical mistakes in the Preliminary Injunction Order which might have caused confusion.

IT IS THEREFORE, THE ORDER OF THIS COURT, THAT:

A. Defendants Union Pacific Railroad Company and Missouri Pacific Railroad Company by, on or before May 31, 1994, shall send a copy of this Order and a letter in the identical form to that attached hereto as Exhibit 1 to

Schlichter, Bogard & Denton, plaintiff's attorneys herein, and on or before June 5, 1994, Defendants shall send to all attorneys to whom Defendants or their attorneys have sent letters of the type described in Paragraph 1 above since December 9, 1993 a copy of this Order and a letter identical to Exhibit 1, filled out with the name of the claimant.

B. The letters set forth in the paragraph immediately above shall be sent by certified mail, return receipt requested.

C. A copy of such letters shall also be sent by June 5, 1994 to the claim agent on each claim and the outside attorney, if any, handling each claim on which a letter is sent pursuant to Paragraph 1.

D. Defendants shall not seek sanctions or penalties of any kind against attorneys who had ex parte communication or interviews with their employee witnesses regarding injuries without Defendants' knowledge or consent.

E. Defendants shall report in a letter to the Court by June 15, 1994 on their compliance with this Order, specifically listing each attorney and pertinent name of the claim on which a letter is sent.

F. A copy of this Order shall be mailed to:

Jerome J. Schlichter
Schlichter, Bogard & Denton
333 Salem Place, Suite 260
Fairview Heights, IL 62208
(Attorneys for Plaintiff)

Thomas E. Jones
Walker & Williams
4343 West Main
Belleville, IL 62223
(Attorneys for Defendants)

SO ORDERED THIS 26th day of May, 1994.

/s/ Daniel J. Stack
DANIEL J. STACK,
JUDGE OF THE CIRCUIT COURT

EXHIBIT 1

" Enclosed is a copy of a preliminary injunction order entered on December 9, 1993 by the Honorable Daniel J. Stack of the Circuit Court for Third Judicial Circuit, Madison County, Illinois enjoining the Union Pacific Railroad and the Missouri Pacific Railroad from using letters instructing Plaintiffs' counsel not to conduct interviews of its employees without its knowledge or consent concerning facts incident to FELA claimants' injuries," and a copy of the recent order entered by the same Court on May 26, 1994. The Missouri Pacific R.R. Co. and the Union Pacific R.R. Co. have been enjoined by the Court from sending you any such letter and the parties of any previous letter which refers to "not interviewing witnesses without the railroads' consent should be ignored."